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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 1017

JAN EMIL DONATO,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ,
410 Douglas Building,
South Spring and Third Streets,
Los Angeles 12, California,
*Counsel for Petitioner.*

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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IN THE

# SUPREME COURT OF THE UNITED STATES

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No.

JAN EMIL DONATO,
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vs.

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*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

## 1. OPINION OF THE COURT BELOW

The final opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages . It is also set forth as Appendix A to this petition.

The prior opinion of said Court of Appeals is reported in 302 F.2d 468 and is also set forth as Appendix B to this petition.

## 2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals (denial of the seasonably filed Petition for Rehearing) was entered on February 26, 1963 [R. :* also see Appendix C to this petition]. The petition for writ of certiorari is filed within the required thirty days' time, as extended by order of Mr. Justice Douglas (Appendix D).

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district court has jurisdiction under 18 U.S.C. § 3231.

## 3. QUESTIONS PRESENTED AND HOW RAISED

The record shows that petitioner reported for but did not submit to induction [Ex. 2-3]. He testified he intended to perfect an administrative appeal from the 1-A classifica-

*All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, and ordinarily is found at the bottom of each sheet of Exhibit 1.

tion but did not do so due to frustration by reason of a forest fire-fighting call [R. ].

Where a Selective Service System registrant charged (in a one count indictment) with refusing to submit to induction is tried on a record made wholly without benefit of counsel, one made under administrative agency regulations that prohibit the employment of an attorney at his Appearance Before Local Board:

Is he required to take every intermediate administrative step to have standing in court to present his defenses?

II. Is he entitled to a trial *de novo* on the relevant facts?

## 4. STATUTES AND REGULATIONS INVOLVED

Amendment V of the Constitution and 32 C.F.R. §§ 1624.1 (b) and 1626.2 (a) of the regulations are involved. They are set forth in the Reasons for Granting Writ.

## 5. STATEMENT OF THE CASE

Petitioner was indicted under U.S.C. Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction [R. 2].

Petitioner pleaded Not Guilty, waived jury trial and was thereafter tried and convicted on May 1, 1961 [R. 4], by Judge William M. Byrne. Petitioner was sentenced on May 22, 1961 [R. 5].

At close of the evidence, a Motion for Judgment of Acquittal was made, argued, and denied [T. 36].

On appeal the Ninth Circuit remanded, 302 F.2d 468, Appendix B to this petition.

On April 24, 1962, the trial court certified to the Court of Appeals by a formal Certificate [R. 10] that it had considered the remand [T. 40], and

On April 24, 1962, appellant was resentenced to three years imprisonment [R. T. 49].

On the second appeal the Ninth Circuit affirmed F.2d , Appendix A to this petition.

## 6. THE FACTS

Petitioner registered with California Local Board No. 85 on January 18, 1955 [Ex. 1-2].

Thereafter he timely filed the standard eight page Classification Questionnaire on February 21, 1955 [Ex. 5-12]. In it he showed he was one of Jehovah's Witnesses, was a minister of religion, regularly serving as such and had been formally ordained [Ex. 7]. He also showed he was a fulltime student at Glendale High School [Ex. 10] and that he was a conscientious objector to participation in warfare [Ex. 11]. He advanced no opinion, at the place provided, concerning the classification he deemed proper to his factual status [Ex. 11, below 7].

Thereafter he timely filed the four page Special Form for Conscientious Objector on March 3, 1955 [Ex. 13]. In it he showed he was opposed to participation in warfare by reason of religious training and belief and that this was in relation to his belief in a Supreme Being [Ex. 13]. He gave scriptural authority to support his statements and reasoning [Ex. 13 (a)]. He explained the part his home teachings had played, he submitted the name and address of a leader of the witnesses in response to the question [=4] upon whom he relied most for religious guidance; he answered question =5 (Under what circumstances, if any,

do you believe in the use of force?) as follows: "I believe in using force in protecting my home against crime or violence, my scriptural reference is in Exodus 22:2." [Ex. 14].

He related his studies and religious activities and how he gave public expression to his views. He gave all details requested of his schooling and employment going back to 1942 [Ex. 14].

He gave the Selective Service System further opportunity for checking the details of his showing by giving at question (=6) all residence addresses since 1937 [Ex. 15].

He showed he was a member of a recognized religious organization, gave its national headquarters address and his local church and local leader and answered all other questions propounded [Ex. 15], including the names and addresses of references using all the spaces provided [Ex. 16]. He appended a letter of even date from the head of the Ministry School of his group attesting to his sincerity [Ex. 15 (a)].

There is no evidence in the file to rebut his *prima facie* case for one of the two conscientious objector classifications.

Nevertheless, the local board, after having plenty of time to check his statements and enter its findings in the file concerning such a check-up [it did not classify him until thirty-five months later, February 19, 1958] classified him Class 1-A (Available for Military Service, § 1622.10, 32 C.F.R.) [Ex. 12].

Thereafter, on July 13, 1960, petitioner had an Appearance Before Local Board. Draft registrants are forbidden to bring an attorney to such a hearing. See Argument. A summary of said meeting was prepared and filed

by the local board [Ex. ]. This summary shows the positions of both the petitioner and of the board: Petitioner frankly volunteered that he understood his ministry activity did not meet the ministry classification standards of the Selective Service System and stated "I think I should have a 1-O which is the conscientious objector." [Ex. 29].

The local board's position was that it would not change its classification after learning the following:

1. He would not "go to work if ordered as a 1-O" [Ex. 29].

2. He would protect his relatives in their homes against enemies [Ex. 29].

In court he complained of the accuracy of the summary's account by testifying that the following was the actual statement made by him:

> "I was asked by the Board what I would do in the case of an enemy attack, and for example say my parents, my father and mother were in need of help, they wanted to know if I would protect them. I told them if my father and mother were under my roof, under my support, I would feel it my duty to protect them from any violence of any kind." [T. 29].

He did not take an appeal for reasons that were related in his testimony; he had made up his mind "to take an appeal within the 10 days" [T. 29], but that he was notified he should get ready for a fire in the Angelus National Forest and that he was called to fight this fire on the 20th and was kept in this area fighting fires until the 28th [T. 30].

## 7. REASONS FOR GRANTING THE WRIT

I.

A question important to hundreds of draft registrants is presented by this petitioner. It has not been determined by this Court but should be.

It is whether a selective service registrant, professing to be a conscientious objector who reports at the induction station as ordered and there refuses to submit to induction has "exhausted his administrative remedies." Hasn't he gone to the end of the line, as required by this court in *Falbo* v. *United States*, 320 U.S. 549 (1944)? Put another way: Is an intermediate step provided by the regulations and couched in permissive language really a mandatory step? 32 C.F.R. § 1626.2.

1626.2 Appeal by Registrant and others.—(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from the classification of a registrant by the local board in any class other than Class I-C, Class I-W, Class IV-F, and Class V-A.

The appeal opportunity above referred is but one of several administrative steps available to a registrant aggrieved over a rejection of his claim for a particular classification. All steps before the Order to Report for Induction (except Order to Report for Physical Examination) are permissively worded as is the above § 1626.2. Further, nowhere is the registrant cautioned that he must take this one or that one to have standing in court to complain of misclassification or of denial of procedural due process.

It seems clear that all these intermediate steps are optional, that they are like rungs of a ladder and that arriving at the end of the ladder is the essential step to "complete the selective process" as held in *Falbo, supra.* This Donato did. He reported for but refused to submit to induction.

The primary question presented is whether the rule of exhaustion of remedies should be applied to a case like this so as to exclude an otherwise meritorious defense against a criminal charge. As the dissent in the first appeal of this case pointed out the non-application of the rule would not free the defendant; and the only burden imposed on the trial courts would be that of hearing the defense.

If the rule should be applied in criminal cases the next question is how harshly it should be applied. Should it ever be applied where the sentence, as here, can be a prison term whose length approximates that of the entire adult life of the defendant?

If the rule is applicable to cases where the possible loss to the defendant is so great compared with the effort required of the court, is the rule applicable where defendant may have been unaware of the grave consequences of his lack of action?

It was held by the Ninth Circuit in its last opinion in this case (302 F.2d 468, 470) that even if the answers to the above questions are affirmative, still the rule is not applicable unless the omission was "deliberate." Does this mean that deliberate intent must be shown, *i. e.*, must the record show that defendant deliberately refused to act? We believe it must; we point out that no such evidence was presented or even referred to.

If application of the rule does not require demonstration of deliberate ill intent doesn't this mean that the burden has been shifted to the defendant of proving his innocence? If this remarkable conclusion were correct, exhaustion of administrative remedies would emerge as a potent weapon for those who would shortcut the entire system of evidentiary rules laboriously erected through ten centuries of Anglo-Saxon law.

A second reason for granting the writ is that a second question should be decided:

Does the Fifth Amendment prohibit the conviction of a defendant where all the following elements are present:

(a) The government's case is entirely based on an administrative record.

(b) The administrative record was made entirely without benefit of counsel, the agency's regulations forbidding counsel at the hearing, and

(c) Unanimous and long-standing judicial interpretation prohibits a trial de novo on the relevant facts?

32 C.F.R. § 1624.1 (b):

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: Provided, that if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: And provided further, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel

It is beyond dispute, therefore, that both the regulations and the decisions forbid a selective service registrant to build his record with assistance of counsel.

It is the contention of petitioner that at some stage of these proceedings he is entitled to the assistance of counsel in making the record on which his liberty is to depend, either before the administrative tribunal or in the district court. The assistance of counsel in the district court is of small consequence if the record on which appellant is tried and by which he is bound was made without the right to counsel.

If this contention is not sound, then the personal appearance of a registrant before the Local Board is a trap.

Many cases hold that a denial of counsel before the Board is not a denial of due process of law. *Niznik* v. *U. S.*, (C.A. 6) 173 F.2d 328; *Peterson* v. *U. S.*, (C.A. 6) 173 F.2d 111. It is also well settled that a defendant is bound by the Board's classification; however erroneous, if there was any substantial basis for the classification order. *Cox* v. *U. S.*, 332 U.S. 442, 68 S. Ct. 115, 92 L. Ed. 59. Yet it is fundamental in our system of jurisprudence that a person accused of crime has the right to be represented by counsel. In the leading case of *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527, this court said at pages 68-69:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. * * *
>
> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of

little avail if it did not comprehend the right to be heard by counsel. * * *"

It is perfectly consistent with due process of law to hold a defendant bound by a factual record made before an administrative tribunal. It is consistent with due process of law to deny a party counsel in an administrative hearing. But it is not consistent with due process of law for an administrative agency to summon a party before it for hearing, deny him counsel at such hearing by regulation and then hold him bound on a criminal trial by the factual record made at such a hearing.

A citizen is entitled either to the assistance of counsel before the Local Board or to a trial de novo on the facts and law in the District Court.

## CONCLUSION

This petition should be granted for one or both of the two reasons herein stated.

Respectfully submitted,

J. B. TIETZ,
410 Douglas Building,
*Counsel for Petitioner.*

April 15, 1963.

# APPENDIX A

## Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN EMIL DONATO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 18,161
Jan. 24, 1963

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: CHAMBERS, MERRILL and BROWNING, Circuit Judges

PER CURIAM

Appellant stands convicted of refusal to submit to induction under the Universal Military Training and Service Act, 50 U.S.C., § 462. He asserts that he is a conscientious objector and that there was no basis in fact for his classification as 1-A by his local board. The United States asserts that appellant failed to take an administrative appeal from the local board's ruling; that appellant accordingly has failed to exhaust his administrative remedies and that this should preclude resort to the courts upon the merits of his claimed exemption. Appellant asserts that he had intended to take an administrative appeal and that his failure to do so was due to the fact that he had been called to duty as a fire fighter in the Los Angeles area; that under these circumstances the exhaustion of remedies rule should be relaxed.

In Donato v. United States, 9 Cir., 1962, 302 F.2d 468, these issues were presented to this court and the applicable law was there discussed. It appeared that the district court, in finding appellant guilty, had applied the exhaustion of remedies rule. It did not appear from the record that the court had given consideration to the circumstances under which appellant had failed to take his administrative appeal. We deemed essential to informed appellate review an expression by the district court as to whether it had considered the excuses presented by appellant for his failure to exhaust his administrative remedies and directed the district court to render its decision upon the question whether under all the circumstances of this case a relaxation of the exhaustion of remedies rule would be just and proper.

This the district court has now done in a certificate to this court. That certificate states in part, "This court did consider the testimony and evidence presented by defendant, balanced the competing consideration; and concluded that under all of the circumstances of this case, a relaxation of the exhaustion of administrative remedies rule would not be just and proper. This court has reviewed the records and files of the case, including the reporter's transcript, and presently is of the same opinion."

The district court in its certificate also states that it disbelieved the appellant's statement that he intended to take an administrative appeal and concludes, "It is clear that the defendant's failure to appeal administratively was deliberate and intentional."

Appellant attacks the district court's reasons for its disbelief as outlined in its certificate. We find them to bear rationally on the issue of credibility.

Judgment affirmed.

(Endorsed) Per Curiam Opinion Filed Jan. 24, 1963.
Frank H. Schmid, Clerk.

## APPENDIX B

### Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
JAN EMIL DONATO,
Appellee.

No. 17,473
Feb. 14, 1962

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: CHAMBERS, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge

Appellant stands convicted of refusal to submit to induction under the Universal Military Training and Service Act, 50 U.S.C. § 462, and has been sentenced to serve three years' imprisonment.

Appellant is a member of Jehovah's Witnesses and asserts conscientious objection to military service. Notwithstanding his showing to this effect, the local board with which he had registered classified him 1-A rather than as a conscientious objector. After reporting for induction in response to the board's order, appellant refused to submit to induction.

Upon this appeal appellant contends that he had made out a prima facie case for a conscientious objector classifi-

cation of 1-O (50 U.S.C., § 456(j)), which case was not rebutted; that there was no basis in fact for the board's classification of 1-A; that under Estep v. United States, 1946, 327 U.S. 114, the board was without jurisdiction to classify him in this manner. While the United States disputes this, its principal contention upon this appeal is that appellant has failed to exhaust his administrative remedies through failure to take an appeal from the local board's ruling to the appeal board established by selective service regulations; and that this failure "prohibited the trial court from examining the propriety of the board's actions in classifying him as it did."

Appellant concedes his failure to exhaust his administrative remedies in this respect, but contends with substantial citation of authority that the exhaustion of remedies rule is not an inflexible rule but is one which may and should be relaxed by the courts in proper cases, at least where, as here, defendant did not interrupt the selective service process, but pursued it to the point where he could go no farther without abandoning his claim of right, reporting for induction, completing his physical examination, and refusing only at the final step of submitting to induction. Compare Falbo v. United States, 1944, 320 U.S. 549, with Estep v. United States, 1946, 327 U.S. 114. The United States, in response, asserts that however flexible the rule may be in other circuits this court has refused to regard it as other than inflexible.

This court's strict adherence to the rule that administrative remedies must be exhausted has been (as in Prohoroff v. United States, 9 Cir., 1958, 259 F.2d 694, and Evans v. United States, 9 Cir., 1958, 252 F.2d 509) in cases where failure to appeal appeared to be a deliberate and intentional rejection of the administrative review which had been provided. An area does remain, however, within

which relaxation of the rule can be found to be just and proper. Each case thus presents the question whether the particular circumstances which exist make the case an appropriate one for relaxation of or strict adherence to the rule.

Here the appellant testified that he had every intention of appealing within the prescribed period; that his failure to do so was due to the fact that he had been summoned to firefighting duty and that upon his return, the period having expired, he believed his appeal rights to have been lost.

The balancing of the competing considerations which a case presents should take place at the trial level where the true facts may be found and their significance weighed. The record does not disclose that such consideration was given in this case. Indeed, if the district court accepted the contentions of the United States, it would have regarded such consideration as unavailable to it. Under these circumstances, an expression by the district court is essential to informed appellate review.

Accordingly, this case must be remanded to the district court for such, if any, hearing as the court, for its assistance, may prescribe and for decision upon the question whether, under all of the circumstances of this case, a relaxation of the exhaustion of remedies rule would be just and proper.

If, upon such consideration, the district court should decide that the rule should not apply under the circumstances of this case, it shall render its decision upon the merits respecting the asserted lack of basis in fact for the board's classification. If the decision of the district court is that the rule should apply, it shall express its opinion to this effect. In either event, a new final judgment

should be rendered preserving rights to further appellate review.

Reversed and remanded with instructions that the judgment be set aside and for further proceedings in accordance with this opinion.

CHAMBERS, Circuit Judge, dissenting:

No particular harm is done here in reopening a judge tried case to probe further into Donato's excuse for not taking his administrative appeal. I think Prohoroff and Evans, supra, were correctly decided on their facts. I would not contend that there are no valid excuses for failure to take an administrative appeal. But, I think on the face of it, Donato has already shown his excuse too weak. Therefore, I dissent.

(Endorsed) Opinion and Dissenting Opinion Filed Feb. 14, 1962.

Frank H. Schmid, Clerk.

## APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 26, 1963.

Before: CHAMBERS, MERRILL & BROWNING, Circuit Judges.

**Order Denying Petition for Rehearing**

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed February 23, 1963, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

## APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

JAN EMIL DONATO,
Petitioner,

vs.

UNITED STATES

**Order Extending Time to File Petition for Writ of Certiorari**

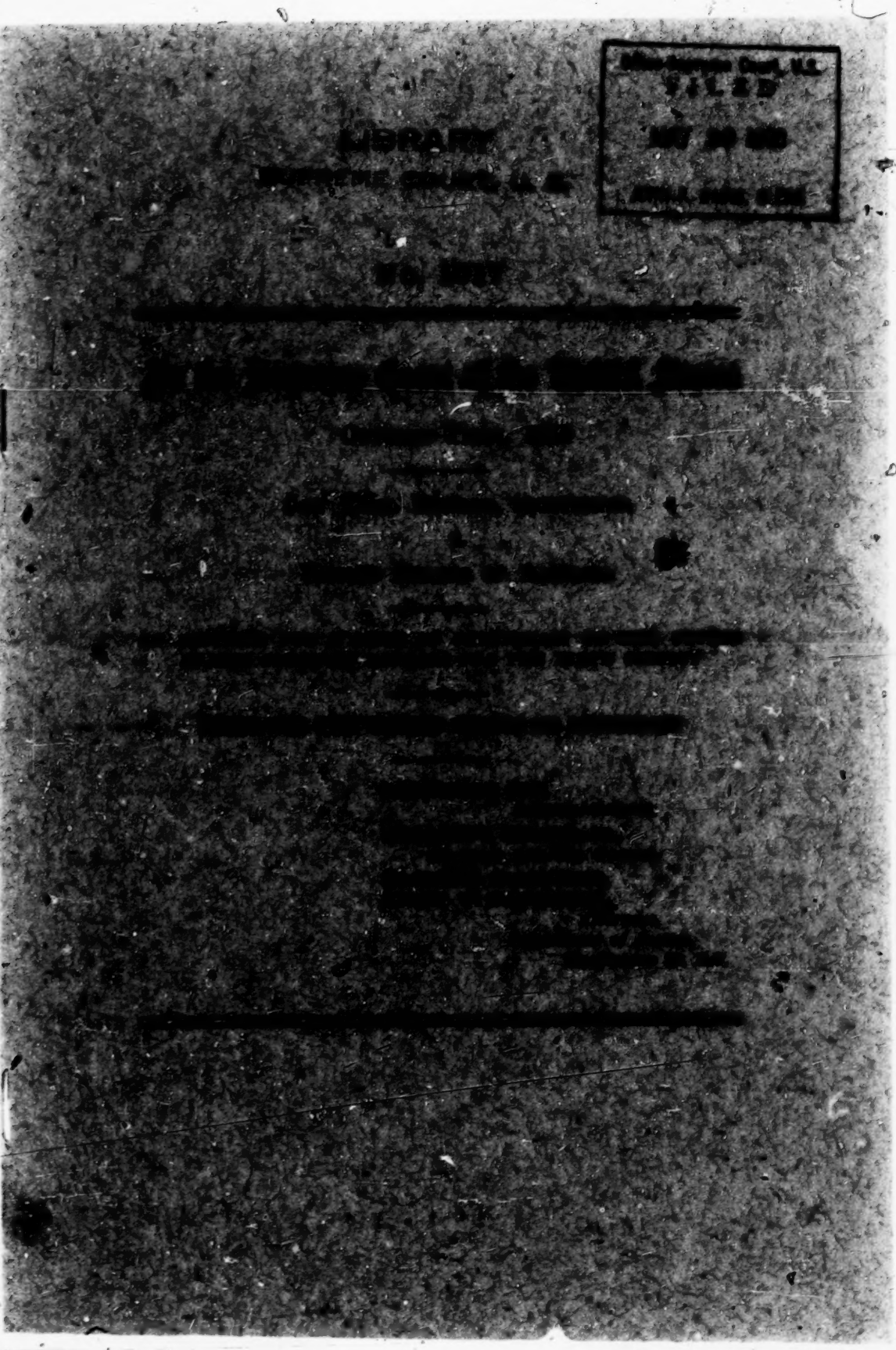
UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 15 ....., 1963.

s/ W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States

Dated this 22nd day of March, 1963.



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688194—63

# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 1017

JAN EMIL DONATO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 314 F. 2d 67. The earlier opinion of the court of appeals remanding the cause (Pet. App. 3–6) is reported at 302 F. 2d 468.

### JURISDICTION

The judgment of the court of appeals was entered on January 24, 1963. A petition for rehearing was denied on February 26, 1963. By order of Mr. Justice Douglas, the time for filing a petition for certiorari was extended to and including April 15, 1963. The petition for a writ of certiorari was filed on

April 13, 1963. The jurisdiction of this Court is based upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in a prosecution for failing to submit to induction in the armed forces, petitioner, having failed to appeal his classification by the local board, was entitled to have the classification reviewed by the district court even though that court found that there was no valid excuse for his failure to appeal.

## STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming his conviction and three-year sentence, imposed by the United States District Court for the Southern District of California, for refusal to submit to induction under the Universal Military Training and Service Act.

The trial was before the court, jury having been waived. Petitioner's selective service file disclosed that he had filed a claim for exemption as a conscientious objector, but was classified I–A on February 19, 1958. Although petitioner admitted at trial that he was aware of his right to request a personal appearance before the board and to appeal his classification (R. II, 31–32), he did not do so. In June 1960, the board, on its own motion, requested postponement of petitioner's induction for the purpose of reconsidering petitioner's claim to classification as a conscientious objector. On June 21, 1960, the board requested petitioner to present himself for an interview on July 13, 1960. After the interview, the board reclassified him I–A and mailed him Form 110, a notification of such

classification. It was stipulated that petitioner received this form and that it gave him notice of his right to appeal (R. II, 27). Again, however, petitioner did not appeal. Ordered to report for induction on September 23, 1960, petitioner reported but refused to be inducted (R. II, 25–26).

Petitioner testified that he had intended to take an appeal within the ten-day period after receiving notice of the I–A classification sent on July 13, 1960, but that on July 18 he was notified to prepare for fire-fighting service—a duty which petitioner, in connection with his employment in excavation work, had signed up to perform for the United States Forestry Service. At midnight of July 20 he was called to work on a fire and remained at this task until July 28. He had very little time between calls on these fires and usually spent the time sleeping (R. II, 28–30). When he returned from the fire-fighting area, he did not communicate with the board, because he knew that his ten days had expired and believed he could satisfactorily explain his failure when the time came. He understood, however, that a letter to the board would have sufficed to make a request (R. II, 33).

The district court found petitioner guilty. On appeal, the court of appeals held that while the rule requiring exhaustion of administrative remedies applies where failure to appeal is a "deliberate and intentional rejection of the administrative review," there is an area "within which relaxation of the rule can be found to be just and proper." In view of the fact that the record did not show whether the trial court had considered and rejected petitioner's expla-

nation of his failure to take an appeal, the cause was remanded for consideration whether, under all the circumstances, it would be "just and proper" to relax the rule of exhaustion (302 F. 2d 468; Pet. App. 3–6).

Upon remand, the trial court read into the record a certificate to be forwarded to the court of appeals. The certificate stated that the court had made a general finding of guilt, petitioner having waived special findings of fact; it had considered petitioner's excuses and had concluded that in the circumstances a relaxation of the rule requiring exhaustion of administrative remedies would not be just and proper; and that petitioner had had ample time to appeal in the interim between the board's action on July 13 and petitioner's assumption of fire-fighting duties on July 20, of which he had two days' notice. Accordingly, petitioner was re-sentenced to imprisonment for three years (R. III, 40–43).

## ARGUMENT

1. It is well settled that a selective service registrant who fails to exhaust his administrative remedies may not interpose the defense of wrongful classification when he is prosecuted for refusal to submit to induction. *Prohoroff* v. *United States*, 259 F. 2d 694 (C.A. 9), certiorari denied, 359 U.S. 907; *United States* v. *Balogh*, 160 F. 2d 999 (C.A. 2); *McGahee* v. *United States*, 163 F. 2d 875 (C.A. 5); *Jeffries* v. *United States*, 169 F. 2d 86 (C.A. 10); *United States* v. *Nichols*, 241 F. 2d 1 (C.A. 7). Cf. *Falbo* v. *United States*, 320 U.S. 549 (as described and distinguished

in *Estep* v. *United States*, 327 U.S. 114), which held that a registrant who had taken an administrative appeal but had not exhausted his administrative remedies by reporting for induction could not, in a subsequent criminal proceeding, challenge the order of the local board.

In applying that settled principle here, both courts below gave ample consideration to possible mitigating circumstances. At the trial, defense counsel, in his opening statement, declared that "the case really will turn on whether or not there was a good enough excuse for not taking the administrative appeal" (R. II, 8). After the district court's general finding of guilt, the court of appeals remanded the case in order to make sure that the excuses offered by petitioner had been taken into account. The district court thereupon issued a certificate stating that both at the original trial and upon review of the record it had considered petitioner's testimony, balanced the competing considerations, and concluded that under all of the circumstances "a relaxation of the exhaustion of administrative remedies rule would not be just and proper" (R. III, 41). The court further found—quite properly, we submit—that since the petitioner concededly knew he had ten days within which to appeal administratively and had two days' advance notice of his call to fire-fighting duties, it is clear that his omission was deliberate and intentional (R. III, 42–43).

Petitioner argues, however, that the doctrine of exhaustion is inapplicable to this case since the appeal was a purely optional step and since he eventually

did report for induction. That argument, if accepted, would give a registrant the right to disregard the elaborate procedures set up by Congress for review of selective service classifications and would require the courts to act, in the first instance, as boards of review for decisions of the local board. It is not the function of the courts, sitting as "super draft boards," to substitute their judgment for that of the agencies designated by law. Cf. *Witmer* v. *United States*, 348 U.S. 375, 380–381.

2. Petitioner urges that the Fifth Amendment entitled him either to the assistance of counsel before the local board or a trial *de novo* on the facts and law in the district court, since otherwise he would be convicted of a crime on the basis of a record compiled without benefit of counsel. This contention is without merit. As petitioner himself acknowledges (Pet. 10–11), it is well settled both that (a) a denial of counsel before the local selective service board does not offend the due process clause, *Nizuik* v. *United States*, 173 F. 2d 328 (C.A. 6); *Peterson* v. *United States*, 173 F. 2d 111 (C.A. 6); and (b) that a registrant is bound, in a subsequent criminal action, by the board's classification order unless there is no factual basis for it in the administrative record. *Estep* v. *United States*, 327 U.S. 114; *Cox* v. *United States*, 332 U.S. 442; *Witmer* v. *United States*, 348 U.S. 375.

Moreover, petitioner does not attribute his failure to take an administrative appeal to absence of counsel; on the contrary, he concedes that he was well aware of his right to appeal and that it could be exercised simply by writing a letter. Since he failed

to exhaust this administrative remedy, and thus can no longer raise the issue of wrongful classification at all, the question whether he should be given a trial *de novo* in order that counsel may assist in developing the facts pertinent to that issue does not even arise.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
*Attorneys.*

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